In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 933

EL-GE POTATO CHIP COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 427 F. 2d 903. The decision and order of the National Labor Relations Board (Pet. 7a-19a) are reported at 173 NLRB No. 19; its decision in the related representation proceeding is set forth at Pet. App. 20a-22a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on August 7, 1970. The petition for a writ of certiorari was filed on November 4,

1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly overruled the employer's objections to a representation election without holding an evidentiary hearing, where the objections presented no material issues of fact.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On November 17, 1967, the Board's Regional Director conducted a representation election among the Company's truck drivers, warehousemen, and mechanics (Pet. App. 20a-21a). There were 12 ballots cast for the Union (Local 430 of the Teamsters), 11 against it, and 1 challenged ballot (Pet. App. 20a).

The Company filed timely objections to the election, contending that conduct by the Union had improperly influenced its outcome (Pet. App. 23a-24a). Pursuant to the Board's Rules (29 C.F.R. 102.69(c)), the Regional Director conducted an administrative investigation, giving the parties full opportunity to submit pertinent evidence. His report recommended that the Board sustain the challenge to the ballot of Daniel Sharp (Pet. App. 24a)[1] but overrule the objections (Pet. App. 22a-31a). The Company's objections to the election and the Director's evaluation of them may be summarized as follows:

1. The Company contended that the discharge of Sharp had become a "paramount" issue in the campaign, and thus his appearance on the premises and his voting a challenged ballot gave the appearance to the employees that the discharge had been unlawful and the Union had secured Sharp's reinstatement with the Board's "approval" (Pet. 23a). The Regional Director concluded that Sharp's presence on the employer's premises for the purpose of casting a challenged ballot did not impair the employees' free choice in the election;[2] no evidence was offered by

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[1] The Company challenged the ballot of Sharp on the ground that he had been discharged for cause on October 26, 1967. Since Sharp was not employed on the day of the election and no unfair labor practice charge had been filed respecting his discharge, the Regional Director concluded that he was ineligible to vote.

[2] Sharp's eligibility had been an issue at the pre-election joint conference, where the Company and the Union had taken conflicting positions regarding his eligibility. The Company

the Company or disclosed in the investigation which showed that Sharp, while on the Company's premises, had engaged in any electioneering or made any direct appeals to voters (Pet. App. 25a). The Director also noted that, at the time of the election, the Company did not consider Sharp's presence in the plant and at the polls to constitute election interference, for its observer signed the "Certification on Conduct of Election" at the conclusion of the balloting without qualification (Pet. App. 26a). Finally, the Director ruled that the post-election view of some employees as to the impact of Sharp's presence on their vote [3] was "pure

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said nothing then about prohibiting Sharp's entry into the plant to cast a challenged ballot. (Pet. App. 24a.)

In allowing Sharp to file a challenged ballot, the Board agent followed prescribed procedure. The Board's Rules (29 C.F.R. 102.69(a)) provide that "any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election." Where a prospective voter is challenged, the Board agent does not himself make an eligibility ruling. The Rules further state that the "ballots of such challenged persons shall be impounded" and that, if it is later determined that such ballots may affect the outcome of the election, the "regional director shall investigate such * * * challenges * * * [and issue] a report on challenged ballots * * *" (29 C.F.R. 102.69(c)).

[3] President Gillespie, in an affidavit submitted to the Regional Director, stated that employee Myers "informed me after the election that he was surprised to see Daniel Sharp coming in to vote," and that "he felt that Sharp's presence during the voting influenced many of the truck loaders to vote for the Union" (A. 74-75). Gillespie also stated that, prior to the election, one employee informed plant production manager Robertson "that he would vote *against* the Union if Mr. Robertson would rehire Daniel Sharp" (A. 74, emphasis added). ("A." refers to the Appendix to the briefs in the court of appeals.)

speculation" and of no probative value since it merely reflected " 'the subjective reaction of employees to the alleged interference,' " *Allied Plywood Corp.*, 122 NLRB 959, 961 (Pet. App. 25a).

2. The Company alleged that the Union threatened employees that, if they did not vote for the Union, the Company would lose the business of one of its largest distributors, Gourmet (Pet. App. 23a). The Director, after considering four employees' statements submitted by the Company as well as the affidavits of those employees taken by a Board agent (Pet. App. 26a) and evaluating "the evidence in a light most favorable to the Employer" (Pet. App. 29a), concluded that there was no merit to this objection. The evidence showed that for several years the Company's drivers had discussed with Gourmet's employees and others the possibility that employees of Gourmet might not continue to unload non-union goods arriving from the Company; however, it was undisputed that the Union took no part in these conversations and that many of them took place before the election petition was filed (Pet. App. 28a).[4] Moreover, the Director found, there was no evidence of "threats of reprisal against eligibles [voters]" (*ibid.*). Finally, he noted that the Company, though aware that the statements were made, took no action to advise its employees that Gourmet's employees could not

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[4] Under established Board policy, conduct which takes place before an election petition is filed is not considered a basis for setting aside the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278; *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 31 (C.A. 5).

lawfully refuse to unload its products (Pet. App. 29a).

3. The Company contended that the Union promised employees that, if they voted for the Union, they could get jobs on their days off with other employers under contract with the Union (Pet. App. 23a). The Director considered two employees' statements furnished by the Company, and found, on "substantially undisputed facts," that some employees told other employees that, if the Company were organized, they would be able to obtain jobs with other employers. The Director further found, however, that these statements could not be attributed to the Union or its agents, and in any event that they constituted legitimate discussion by employees of the possible advantages of unionization. The Director accordingly overruled this objection. (Pet. App. 30a.)

4. The Company contended that the Union had threatened an employee with discharge (Pet. App. 30a). The Director found that during the organizational campaign, but before the election petition was filed, several rank-and-file employees told a fellow employee they would bet he would be the first to be discharged if the Union did not get in; the Company, on learning of the incident, assured the employee he would not be fired. The Director concluded that the objection did not afford a basis for setting aside the election, for there was no evidence that the Union was responsible for these statements; the conduct antedated the filing of the election petition (see n. 4, *supra*); and the remarks could not have been viewed as a threat of Union retaliation, because, if the Union

lost the election, it would obviously have been "in no position to cause the workers' discharge, prevent it, or be accountable for it" (Pet. App. 30a-31a).[5]

The Company filed exceptions to the Director's decision, requesting the Board to set aside the election or, in the alternative, to direct a hearing to resolve the factual issues raised by its objections (Pet. App. 10a). The Board, finding that the Company's exceptions raised "no material or substantial issues of fact or law" warranting either reversal of the Regional Director's findings or the direction of a hearing (Pet. App. 21a, n. 1), certified the Union (Pet. App. 21a-22a).

The Company refused to bargain, and an unfair labor practice complaint issued based on charges filed by the Union (Pet. App. 10a). The Trial Examiner granted the General Counsel's motion for judgment on the pleadings, finding that all the issues had already been decided in the representation proceeding (Pet. App. 11a). The Board adopted the Trial Examiner's decision holding that the Company had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union upon request (Pet. App. 7a-8a, 17a-19a).

The court of appeals, one judge dissenting, upheld the Board's findings and conclusions, and enforced its order (Pet. App. 2a-7a).

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[5] Finally, the Director considered and rejected the Company's contention that the cumulative effect of all the events described above was to deprive the employees of their freedom of choice in the election (Pet. App. 31a).

ARGUMENT

The petition is premised on the contention that the Company's objections to the election presented material issues of fact which the Board should not have decided without an evidentiary hearing. As shown above, however, the Board accepted the Company's factual allegations as true, but found that they were not legally sufficient to justify setting aside the election.* Thus, the only question actually presented is whether the Board was reasonable in concluding that the conduct alleged by the Company did not affect the election results. Such an issue, which turns on the particular facts, does not warrant further review. In any event, as the court below correctly held (Pet. App. 6a), the Board's conclusions were reasonable.

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*The only disputed evidence was that concerning the employees' post-election subjective feelings concerning Sharp's presence (n. 3, *supra*), which the Board reasonably concluded lacked probative value. Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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